Enough Rules Already!
Making ethical dispute resolution a reality

By Charles Pou Jr.

Robert Baruch Bush wrote the following ten years ago:

"[To] help mediators resolve [ethical] dilemmas . . . some system of practical guidance is necessary. Such a system should start with careful and systematic training of mediators . . . designed to sensitize mediators to the existence and importance of [ethical] dilemmas, not only in general concept but in very concrete terms…. This type of training in identifying the ethical dimensions of mediation practice is very rare at present, if it exists at all."[1]

Bush's admonition still challenges the dispute resolution field, and could be critical to its long-term health.

All too often when ethical questions arise within the ADR community, the response is "let's write a rule." While well intentioned, this answer leaves us with more than enough rules and standards of conduct. It also results in (1) inadequate methods for systematically instilling skills that help neutrals to avoid ethical dilemmas or to handle effectively those that do arise; and (2) lack of local and national support systems for improving mediators' and provider organizations' awareness and understanding of ethics concepts.

It's time to work on our practices. This article proposes a hands-on strategy for responding immediately to Bush's ethics challenge.

The current ethics landscape

ADR professionals generally concur that ethical behavior is critical in consensus-based dispute resolution. Mediative processes are hardly uniform though, and in practice standards of conduct are defined very differently in diverse settings. Answers may depend on whether a mediator is involved in, for example, a family dispute involving the long-term welfare

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of young children, a labor or commercial case involving sophisticated parties and lawyers, or an international dispute in which effectiveness and neutrality may not reside in the same person.

Notwithstanding agreement on general principles, different mediators propose entirely different responses to ethical challenges in a given situation. For example, while all agree on the critical value of party self-determination, this concept implies to some that parties must be fully informed by the mediator, or otherwise the "self" determination will later be revealed as false. Others eschew any involvement beyond general questioning to assure that self-determination is well-informed; they see anything more as improper.

Experts have produced numerous standards of conduct — mostly for neutrals and occasionally for other ADR providers. While these standards imply agreement on core principles, they are often assessed critically. Some critics decry typical standards for failing to capture the richness of actual practice; for presenting little beyond competing, generalized goals; for necessitating an analytical process to balance competing priorities; or for offering no help for a neutral who has to find and implement a solution in the "real world." Experienced ethicists reply that codes should offer "a language for talking about ethics" rather than clear answers.

Why we should care about ethics

Few writers have described any obvious crisis in ADR professionals'
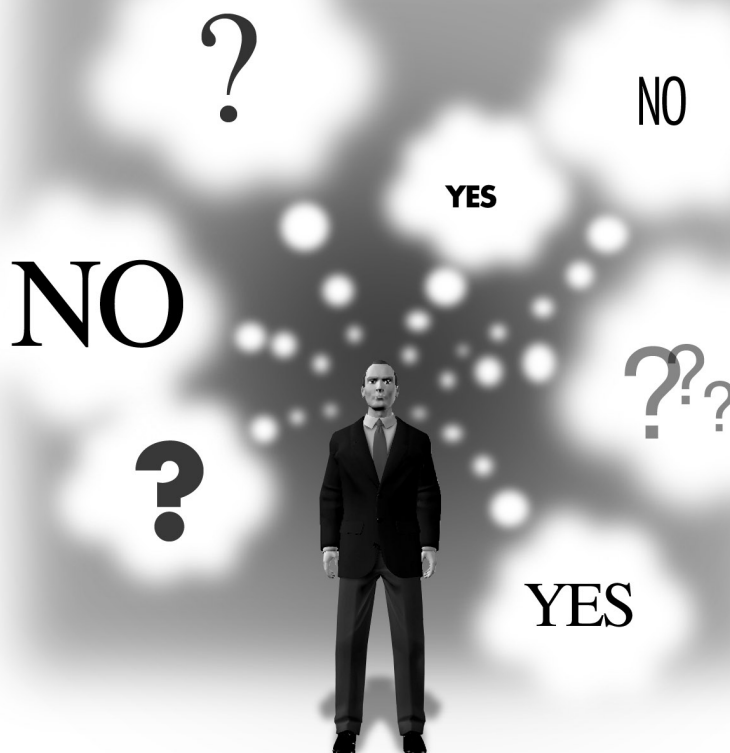
morals and ethics. Some even declare that ethics issues (e.g., confidentiality, advice to parties) receive excessive attention, and that disclosure and market forces meet party desires and assure durable, informed outcomes. Many opine that mediators, unlike brain surgeons, are seldom in a position to cause real harm.

In any case, the field has responded to Professor Bush's challenge with indifference. Many basic training programs treat ethics as a fortieth-hour afterthought. ADR practitioners often are not especially aware of, or thoughtful about, ethical standards. Numerous program administrators complain that trainers often are reticent about taking positions, and that a good percentage of neutrals do not recognize when an ethics issue arises.

Moreover, ADR is extending into new arenas that will increasingly highlight challenges (e.g., in-house corporate programs, consumer disputes, and governmental conflicts that often implicate the public interest). We clearly need better ways of sensitizing these mediators and program administrators — especially new or part-time ones — to their ethical duties.

Finally, by definition, ethical dilemmas are hard. Often they involve balancing professional duties with personal preferences or choosing between competing "good things." In many professions, ethical issues raise tough questions about goals, behavior and control mechanisms. Mediators and other dispute resolvers will be a rare breed if they prove very different.

Some people — and not just those who have higher expectations for ADR practitioners than for many other service providers — would say that dispute resolvers have already shown themselves to be quite human. Several were distressed at the howls of protest from parts of the ADR community that greeted the Uniform Mediation Act and Revised Uniform Arbitration Act consideration of whether to mandate disclosure of conflicts of interest as a matter of law. Many proponents of mandatory disclosure found these protests telling and alarming; looking from the other direction, more than

one protester saw the proponents as naive, or unwilling to pay the price of success. Regardless of who had the better case, we should remember this: in the end, as our successes become greater and our ethical sore spots more exposed, our failure as a community to take immediate steps, starting now, to walk this walk will lead to trouble, including at a minimum stricter regulation.

Thus, the ADR field should pay much closer attention to ethics — not because we are unethical, but because such a focus protects consumers, promotes integrity, and makes us abler and more trusted practitioners.

Why more rules and procedures won't suffice

Because codes offer up only broad principles and often-competing priorities that necessitate an analytic process,[2] some experts advocate that we focus on enhancing grievance processes, offering precedential expert opinions, or setting more detailed, context-specific standards for different practice areas or styles. Other commentators disagree, and prefer to promote ethical behavior by enhancing mediators' awareness of and ability to effectuate evenhanded, defensible responses in tough cases. The latter group suggests that making ethics more central to the way we "think like a mediator" improves our ability to avoid problems and respond creatively.

While added rules may on rare occasion be needed, any major focus on "top down" rule rewriting risks being non-inclusive, as well as inactive navel-gazing. By contrast, a "thought process" approach recognizes that ethics requirements and good practice are closely related, that much of what a mediator might do to assure a durable outcome may enhance ethical behavior, and that "ethicizing" decisions

may inhibit a neutral's flexibility and creativity. A confident mediator who knows her own mind and principles can find apt solutions and avoid capitulation to problematic norms.

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Rather than seeking "more detailed rules," we should accept that handling complex ethical issues will seldom involve "looking up the answer." Ethical dilemmas typically give rise to a range of possible responses, and context matters. Moreover, we have tools, like disclosure, to shape parties' expectations and affect the acceptability of certain kinds of behavior, thus allowing all neutrals to work effectively, if diversely, under existing standards.

A practical agenda for helping neutrals perform ethically

An informal agenda for an optimally ethical ADR world involves (1) establishing systems that allow neutrals to know their obligations and that support discussion of difficult cases "before the deal is done" and (2) improving how we teach mediators to approach ethical issues. Worthwhile avenues include the following:

Improve education on handling ethics issues

Basic and advanced mediation training programs should place systematic exploration of applicable codes much closer to the core of their curricula. Ethics should not be treated as an afterthought in "practical" skills training, or as something separate from good practice. The better prepared a mediator is to perceive, analyze and avert or deal with dilemmas, the better the mediator will be.

Mary Thompson, an experienced dispute resolution trainer, counsels that handling ethical dilemmas requires competency in at least four different areas: self-awareness, knowledge of professional standards, analysis and decision-making skills, and in-the-moment performance. The last of these competencies involves sharpening skills by applying the results of the first three in a manner appropriate to the situation, the neutral's style, and individual strengths and limitations. Each competency has its own aspects, and Thompson has described their practice and training implications. (See her companion article, at page 23.)

Thompson notes that ethical decision making involves more than knowing a code; it also requires understanding those personal values and other factors that affect a mediator's ability to remain impartial and ethical. Thompson points out that a mediator must be able to analyze an ethical dilemma and decide on a course of action, often during the fast pace of a session. Finally, she says, a mediator must not only arrive at an ethical decision, but also implement a suitable course of action that minimizes damage to the parties, the process and the role of the mediator.

Thompson notes that each of these competencies is best learned via differing instructional modes, and she has suggested creative, engaging learning activities. While some are widely used, others are innovative; especially when taken together, they raise the possibility of replicable pedagogical models for ethics education.

Focus more on the relation between ethics and good practice

A key, if obvious, step is helping neutrals, especially newer ones, to recognize ethical problems and think about how to deal with them. One initiative is to try to assure that focused ethics discussions play more prominent parts in professional conferences.

Create ethics hotlines, web sites and information sources

In many other professions ethics web sites are common.[3] They often include a variety of applicable or analogous codes, an introduction covering the function and value of codes of ethics, sample cases, links to other sites, and a bibliography.[4] ADR groups should establish such sites; they need not be sophisticated or costly, especially if they seek to compile or to help inquiring minds link to available sources.

Hotline ideas range from an e-mail address to which a mediator facing an ethical dilemma could write for reactions to more elaborate opportunities for structured feedback. Practical

mediators to have the right kind of conversations about ethics problems. A few well-run court and community programs now offer similar models worthy of attention and possible emulation. Similarly, small groups of mediators (say, eight to ten) should commit to coming together periodically, and holding themselves open generally, to discuss ethical aspects of their cases with other group members in "real time."

Improve complaint handling

Options to improve our ability to provide expeditious, informal handling of complaints deserve a closer look.[5]

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issues involve timeliness concerns and possible lack of opportunity for true dialogue. The hotline could essentially serve as an entry point for identifying a peer counselor, "duty officer," or other local or regional advice source.

Use case studies more effectively

Other professional groups' ethics programs rely considerably on case studies of ethical conundrums, with or without commentary. We should do far more to develop compendiums presenting common situations, and circulate them to trainers and mediators. Some trainers have already developed case studies for ethics teaching purposes, and uploading them to an ADR ethics web site would be a good step.

Build support systems

Some have recognized the most effective learning often comes with other mediators in a "guildhall" framework that encourages regular exposure to different models and experiences. We should begin to develop local or regional networks of people conversant with ethics standards and mediation practice; these networks will allow

A spectrum of possible carrot-and-stick approaches can promote suitable behavior: setting standards, educating practitioners, supporting good practice, offering feedback, cajoling, chiding, humbling, humiliating, and, if all else fails, disciplining or expelling. Standards developers should carefully consider this continuum and the implications of decisions about who ought to be doing what along it.

Some current after-the-fact systems, while implemented in a very professional manner, focus on relatively formal processes whose effectiveness and "user friendliness" have been questioned. Those in the ADR field will need to proceed thoughtfully though; these processes pose real confidentiality, fairness, timeliness and efficiency challenges.[6]

The inclusiveness of the processes used to develop standards will be important to their quality, understandability and acceptance. Decisions as to who should be developing (and enforcing) ethical standards, for whom, and how could be as important as the specific principles adopted.

Move the focus beyond individual neutrals

Most codes have tended to place the onus on individuals. However, the quality of ADR services that users receive depends also on variables having little to do with an individual mediator. A program administrator's intake, assignment and other actions greatly affect the "justice" that parties receive and their satisfaction. Similarly, systems designers and trainers sometimes are asked to offer services or advice where they know that the program is very poorly conceived or will be run so unfairly or ineptly as to affect the field's long-term credibility.

We should pursue a nascent trend to think "beyond the mediator," paying systematic attention to macro issues. A few strides have been taken, such as the CPR-Georgetown Commission on Ethics Principles for ADR Provider Organizations,[7] on the responsibilities of roster and program managers.

We also should encourage systematic interchange on ethics and quality among program administrators, provider organizations, trainers and systems designers. Such exchanges will promote a growing sense that these are professions, or at least areas of worthy endeavor; that this work can be performed well, or poorly, or even unethically; and that converging to discuss how to do the work adeptly is valuable. The Key Bridge Foundation's Clearinghouse for Mediation Program Managers: A Resource for Mediator Rosters[8] is one excellent initial step.

olution: Embrace uncertainty

Surely if "ethics is part of thinking like an engineer," then mediators and others in the ADR field need to internalize ethical precepts as part of thinking and acting as dispute resolvers.[9]

As a profession, we probably will still be struggling 20 years from now to define who we are and how we should behave. While this struggle can be healthy, we must recognize that any move that leaves the field better able to handle ethical problems involves accepting risks and embracing the complexity of ethical decision making.

Some may prefer to maintain the status quo; others will favor the "exactitude" of more prescriptive edicts and grievance procedures. We should resist these pressures, and be prepared to explain why we fancy something more than laissez-faire and less than rigid regulation. This approach necessarily requires accepting that detailed codes offer limited specific help but do not further a rich, resilient practice.

The flexibility and responsiveness of ADR methods give them much of their meaning. While we cannot disclaim the importance of efficiency and accountability, we should accommodate potentially competing goals in ways that (1) value flexibility and acknowledge mediators' disparate styles, and (2) recognize mediation's potential to accomplish far more than mere efficient decision making.

The ideal system would employ a minimum of regulatory strictures and procedures, and would instead (1) trust dispute resolvers to make the correct choices without giving them the "answers" and (2) encourage communication during mediation in lieu of detailed restrictions and proceduralized complaint processes. To get there, we should focus at this time on (1) developing individual ethical and professional capacities, (2) creating more effective educational and support systems, and (3) enhancing and improving ethics-related resources.

We should, in short, be reflective rather than prescriptive, and active instead of reactive. If we do otherwise, we may ultimately find our ethical dilemmas multiplied.

Endnotes

[1] Robert Baruch Bush, *A Study of Ethical Dilemmas and Policy Implications*, 1994 J. Dis. Resol. 1, 47.

[2] An example: the ABA/SPIDR/AAA Joint Standards of Conduct promote self-determination as "the fundamental principle of mediation." This means that parties can structure their resolution however they want, for whatever reasons. But tension occurs between this goal and the principle of informed consent and other goals.

[3] An NSF-funded web site for scientists containing codes, case studies, commentaries, examples of "moral heroes," transcriptions of forums, and an online hotline. Online Ethics, at http://onlineethics.org. Another ethics web site worth exploration is provided by the Center for the Study of Ethics in the Professions. *See* http://csep.iit.edu.

[4] *See* The Association for Practical and Professional Ethics (APPE), at http://ezinfo.ucs.indiana.edu/~appe/home.html.

[5] The Association for Conflict Resolution (ACR) has begun to examine how a new Ethics Committee can play a complaint-handling role. The primary responsibility of the Ethics Committee will be to review and address ethics complaints. In addition, the Committee is authorized to offer mediation under appropriate circumstances.

[6] A few questions worth considering in any such effort: Who would serve as ethics committee members, peer reviewers, mediators or ombuds? How would the various roles be structured and carried out, especially in light of resource and burden issues and possible regional and stylistic variations? Should a committee have any authority to issue sanctions or public findings? Would there be any public record of process or results? Are there antitrust, fairness or appearance concerns that ought to be addressed?

[7] CPR-Georgetown Comm'n on Ethics, Principles for ADR Provider Organizations (2001).

[8] At http://www.crinfo.org/mediation-program-managers.

[9] Michael Davis, *Teaching Ethics Across the Engineering Spectrum*, Presentation to the Online Proceedings of the International Conference on Ethics in Engineering and Computer Science (Mar. 21-24, 1999).